

To: Tommy Hoyt, Chair, MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group

From: Richard Cram

Re: Memorandum re Prioritized Issues List—Issues No. 5-8

Date: August 30, 2019

This memorandum states questions raised by and information concerning Issues No. 5 through 8 from the “baker’s dozen” Prioritized Issues List below. The MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group is tasked with addressing that list of issues. The work group will prepare a “white paper” concerning those issues for consideration by the Uniformity Committee. The work group discussed Issues No. 1 through 4 during the August 29, 2019 teleconference meeting. A memorandum concerning those issues can be downloaded from the MTC website at www.mtc.gov from the agenda page for this work group. Issues No. 5 through 8 will be the focus of the next teleconference meeting of the work group on September 19, 2019, time permitting.

Prioritized Issues List:

- 1. Definition of marketplace facilitator/provider**
- 2. Who is the retailer?**
- 3. Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection**
- 4. Marketplace seller-marketplace facilitator/provider information requirements**
- 5. Collection responsibility determination**
- 6. Marketplace seller economic nexus threshold calculation**
- 7. Remote Seller sales/use tax economic nexus threshold issues**
- 8. Certification requirement**
- 9. Information sharing**
- 10. Taxability determination**
- 11. Return simplification**
- 12. Foreign sellers**
- 13. Local sales/use taxes**

Questions and Information Concerning Issues No. 5-8

- 5. Collection responsibility determination**

Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation?

ADOR Response: No. Alabama's marketplace facilitator law, Section 40-23-199.2, Code of Alabama 1975, and Rule 810-6-2-.90.04 requires marketplace facilitators to collect on all marketplace sales. Rule 810-6-2-.90.04 reads as follows:

(2) Requirements for Participating Marketplace Facilitators

(a) Except as provided in subparagraph (2)(b), effective January 1, 2019, participating marketplace facilitators with transactions in excess of the qualifying amount (\$250,000) are required to collect and remit simplified sellers use tax (SSUT) on all taxable transactions made through the marketplace facilitator's marketplace by or on behalf of a marketplace seller, including those marketplace sellers that would otherwise have an obligation to collect and remit sales or use tax on these transactions.

(b) Transactions made through the marketplace facilitator's marketplace by or on behalf of a related party that has a retail location in this state are subject to sales tax.

The following states have included provisions in their marketplace facilitator/provider collection statutes permitting the marketplace facilitator/provider and the marketplace seller to negotiate which party has the collection obligation: ME, MN, NV, NJ. Examples are provided below:

Maine 2019 HP 1064:

A. Except as provided in paragraph B, a marketplace facilitator facilitating sales to buyers in the State shall collect and remit the sales or use tax on all taxable sales to buyers in the State.

B. A marketplace facilitator is not required to collect and remit sales or use tax on a sale from a marketplace seller to a buyer in the State if the marketplace facilitator requests and maintains a copy of the marketplace seller's registration certificate to collect sales and use tax in the State issued under section 1754-B, subsection 2.

C. Nothing in this section may be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with

each other regarding fulfillment of the requirements of this chapter.

Minnesota 2019 HF 5:

Except as provided in paragraph (d), a marketplace provider maintaining a place of business in this state and a marketplace provider not maintaining a place of business in this state who facilitates retail sales in Minnesota or to a destination in Minnesota shall collect sales and use taxes and remit them to the commissioner under section 297A.77 unless:

(1) the retailer provides a copy of the retailer's registration to collect sales and use taxes in this state to the marketplace provider; and
(2) the marketplace provider and retailer agree that the retailer will collect and remit the sales and use taxes on marketplace sales facilitated by the marketplace provider.

(c) Nothing in paragraph (b) shall be construed to interfere with the ability of a marketplace provider and a retailer to enter into an agreement regarding fulfillment of the requirements of this chapter.

Nevada 2019 AB 445:

2. The provisions of this chapter relating to the imposition, collection and remittance of sales tax and the collection and remittance of use tax do not apply to a marketplace facilitator described in subsection 1 if:

(a) The marketplace facilitator and the marketplace seller have entered into a written agreement whereby the marketplace seller assumes responsibility for the collection and remittance of the sales tax, and the collection and remittance of the use tax, for retail sales made by the marketplace seller through the marketplace facilitator; and

(b) The marketplace seller has obtained a permit pursuant to NRS 372.125 or registered pursuant to NRS 360B.200.

☐ Upon request of the Department, a marketplace facilitator shall provide to the Department a report containing the name of each marketplace seller with whom the marketplace facilitator has entered into an agreement pursuant to this subsection and such other information as the Department determines is necessary to ensure that each marketplace seller with whom the marketplace facilitator has entered into an agreement pursuant to this subsection has obtained a permit pursuant to NRS 372.125 or registered pursuant to NRS 360B.200.

New Jersey 2018 A. 4496:

Nothing in this section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into an agreement with each other regarding the collection and payment of tax imposed under P.L.1966, c.30 (C.54:32B -1 et seq.).

RILA Model includes the following provision:

Nothing in this Section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter].

Should the state tax agency have the authority to waive the marketplace facilitator/provider collection requirement in certain limited circumstances? Would such an authorization raise any “unlawful delegation” concerns?

ADOR Response: No.

The following states allow the head of the state tax agency to waive the marketplace facilitator/provider collection requirement in certain circumstances: MD MA OH TX VA WI.

Examples of states with “waiver” provisions are provided below:

Maryland 2019 HB 1301:

(H) (1) A MARKETPLACE FACILITATOR AND MARKETPLACE SELLER MAY APPLY TO THE COMPTROLLER FOR A WAIVER OF THE COLLECTION REQUIREMENT UNDER THIS SECTION IF:

(I) THE MARKETPLACE SELLER IS A COMMUNICATIONS COMPANY THAT IS PUBLICLY TRADED OR IS CONTROLLED, DIRECTLY OR INDIRECTLY, BY A COMPANY THAT IS PUBLICLY TRADED;

(II) THE MARKETPLACE FACILITATOR AND MARKETPLACE SELLER ENTER INTO AN AGREEMENT THAT THE MARKETPLACE SELLER WILL COLLECT AND REMIT ALL APPLICABLE SALES AND USE TAXES IMPOSED UNDER THIS TITLE; AND

(III) THE MARKETPLACE SELLER PROVIDES EVIDENCE TO THE MARKETPLACE FACILITATOR THAT THE MARKETPLACE SELLER IS LICENSED UNDER § 11-702 OF THIS TITLE TO ENGAGE IN THE BUSINESS OF AN OUT-OF-STATE VENDOR IN THE STATE OR A

RETAIL VENDOR IN THE STATE.

(2) IF THE WAIVER UNDER PARAGRAPH (1) OF THIS SUBSECTION IS AUTHORIZED:

(I) THE MARKETPLACE SELLER SUBJECT TO THE AGREEMENT UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL COLLECT AND REMIT THE SALES AND USE TAX IMPOSED UNDER THIS TITLE;

(II) THE MARKETPLACE FACILITATOR IS NOT REQUIRED TO COLLECT OR REMIT THE SALES AND USE TAX IMPOSED UNDER THIS TITLE; AND

(III) THE MARKETPLACE FACILITATOR IS NOT LIABLE FOR THE FAILURE OF A MARKETPLACE SELLER TO COLLECT AND REMIT ANY SALES AND USE TAX IMPOSED UNDER THIS TITLE.

(3) THE COMPTROLLER SHALL ADOPT REGULATIONS THAT ESTABLISH:

(I) THE CRITERIA FOR OBTAINING A WAIVER UNDER THIS SUBSECTION; AND

(II) THE PROCESS AND PROCEDURE TO APPLY FOR A WAIVER.

Massachusetts 2019 H 4000:

(f) A marketplace facilitator may request and may be granted a waiver from the requirements of this section, at the discretion of the commissioner, if the following requirements are met:

(1) the marketplace facilitator submits a waiver application to the commissioner substantiating that, based on the facts and circumstances of the marketplace transaction, the marketplace facilitator can presume in good faith that the applicable taxes are collected and remitted by a marketplace seller required to be registered to collect tax under this section;

(2) the marketplace facilitator collects the applicable tax registration numbers of marketplace sellers transacting on the marketplace platform; provided, that said registration numbers shall be kept in the books and records of the marketplace facilitator and may be examined by the commissioner upon request;

(3) the marketplace seller is required to register to collect sales tax; and

(4) any other requirement established by the commissioner by regulation.

(g) For telecommunications services that are taxable under this chapter and chapter 64I, the commissioner may, at the commissioner's discretion, grant a waiver to allow a marketplace seller to collect and directly remit the applicable taxes on sales of such services to the department.

(h) If a waiver is granted pursuant to subsection (f) or (g):

- (1) the tax levied under this section shall be (i) collected directly by the marketplace seller or by the marketplace facilitator on behalf of the marketplace seller and (ii) remitted by the marketplace seller(s);
- (2) except as otherwise provided in paragraph (1), the marketplace facilitator shall not be required to collect and remit any applicable taxes or fees;
- (3) the marketplace facilitator is relieved of liability for remittance of tax on the applicable sales made through the marketplace platform on behalf of those marketplace sellers; and
- (4) a marketplace seller shall be subject to audit by the commissioner with respect to all retail sales for which it is required to remit tax.

Ohio 2019 HB 166:

Sec. 5741.071. (A) A marketplace seller may request and shall obtain a waiver from the tax commissioner for a marketplace facilitator not to be treated as a seller pursuant to division (E) of section 5741.01 of the Revised Code with respect to a specific marketplace seller if the following conditions are met:

- (1) The marketplace seller certifies it has annual gross receipts within the United States, including the gross receipts of any affiliate, as defined in section 122.15 of the Revised Code, of at least one billion dollars;
- (2) The marketplace seller or its affiliate, as defined in section 122.15 of the Revised Code, is publicly traded on at least one major stock exchange;
- (3) The marketplace seller is current on all taxes, fees, and charges administered by the department of taxation that are not subject to a bona fide dispute;
- (4) The marketplace seller has not, within the past twelve months, requested that a waiver related to the marketplace facilitator at issue be canceled nor has the waiver been revoked by the commissioner; and
- (5) The marketplace seller has not violated division (B) of section 5739.30 of the Revised Code.

(B) A marketplace seller shall request a waiver on the form prescribed by the commissioner. A request for a waiver shall contain a signed declaration from the marketplace facilitator acquiescing to the request for a waiver. A waiver request that is not ruled upon by the commissioner within thirty days of the date it was filed is deemed granted. A waiver that is granted by the

commissioner or deemed to be granted is effective on and after the first day of the first month that begins at least thirty days after the commissioner grants the waiver or the waiver is deemed granted. The waiver is valid until the first day of the first month that begins at least sixty days after it is revoked by the commissioner or cancelled by the marketplace seller.

(C)(1) If a waiver is granted by the commissioner, the commissioner shall notify the marketplace seller and the seller shall be considered the vendor pursuant to division (C) of section 5739.01 of the Revised Code or a seller pursuant to division (E) of section 5741.01 of the Revised Code, as applicable.

(2) A marketplace seller is required to notify the marketplace facilitator of the status of the waiver of the marketplace seller. However, if a waiver is denied by the commissioner, a copy of the denial shall be provided to the marketplace facilitator.

(3) A marketplace seller that has been issued a waiver under this section may cancel the waiver by sending notice to the commissioner and to the marketplace facilitator identified in the waiver application. The commissioner may revoke a waiver if the commissioner determines that any of the conditions described in divisions (A)(1) to (5) of this section are no longer met by the marketplace seller. The commissioner shall notify the marketplace seller and the marketplace facilitator upon revoking a waiver.

(D) Notwithstanding section 5703.21 of the Revised Code, the commissioner may divulge information related to the status of the waiver sought by or granted to the marketplace seller for a particular marketplace facilitator to either the impacted marketplace seller or marketplace facilitator.

(E) The commissioner may promulgate rules the commissioner deems necessary to administer this section.

Texas 2019 HB 1525:

(k) The comptroller may adopt rules and forms to implement this section and by rule except certain marketplace providers from some or all of the requirements of this section.

Virginia 2019 H 1722:

3. Notwithstanding the provisions of subdivisions 1 and 2, the Department

shall allow for a waiver from the requirements of subdivisions 1 and 2 if a marketplace facilitator demonstrates, to the satisfaction of the Commissioner, that either (i) all of its marketplace sellers already are registered dealers under § 58.1-613 or (ii) the marketplace seller has sufficient nexus to require registration under § 58.1-613 and that collection of the tax by the marketplace facilitator for such marketplace seller would create an undue burden or hardship for either party. If such waiver is granted, the tax levied under this chapter shall be collectible from the marketplace seller. The Department shall develop guidelines that establish (a) the criteria for obtaining a waiver pursuant to this section, (b) the process and procedure for a marketplace facilitator to apply for a waiver, and (c) the process for providing notice to an affected marketplace facilitator and marketplace seller of a waiver obtained pursuant to this subdivision.

Wisconsin 2019 AB 251:

- (b) A marketplace provider whose only activities are facilitating sales of tangible personal property or services described in sub. (2) (a) 1. on behalf of marketplace sellers operating under a hotel, motel, or restaurant brand name shared with the marketplace provider may submit an application to the department to request a waiver from collecting and remitting tax on sales facilitated on behalf of marketplace sellers. The application shall include the name and address of all marketplace sellers selling or furnishing such tangible personal property or services in this state, the marketplace seller's sales or use tax permit number obtained under sub. (7) or s. 77.53 (9), and any other information the department requires. The department may grant the waiver if it is satisfied that the tax due under this chapter is collected and remitted by the marketplace sellers. A marketplace provider that is granted the waiver must, within 60 days from a written request by the department, provide the name and address of all marketplace sellers selling or furnishing such tangible personal property or services in this state, the marketplace seller's sales or use tax permit number obtained under sub. (7) or s. 77.53 (9), and any other information the department requires.
- (c) The department may grant waivers under par. (b)

for other types of marketplace providers if there is evidence that the marketplace sellers have a history of reliably collecting and remitting to the department the tax on sales or there is other evidence that the marketplace sellers will reliably collect and remit to the department the tax on sales.

The RILA Model contains the following provision:

[The Department] may grant a waiver from the requirements of this section if a marketplace facilitator demonstrates, to the satisfaction of [the Department] that substantially all of its marketplace sellers already are [registered sellers] under [cite code section]. If such waiver is granted, the tax levied under [cite code section] shall be collectible from the marketplace seller. [The Department] shall develop guidelines that establish the criteria for obtaining a waiver pursuant to this section, the process and procedure for a marketplace facilitator to apply for a waiver, and the process for providing notice to an affected marketplace facilitator and marketplace seller of a waiver obtained pursuant to this subsection.

Should marketplace facilitator/provider collection requirements exclude certain services?

ADOR Response: Only to the extent that such transactions are otherwise not subject to taxation.

States that have enacted marketplace facilitator/provider collection requirements generally apply those to the full extent of their tax bases: retail sales of tangible personal property, taxable services, and taxable digital products. However, some states have limited the marketplace facilitator/provider collection requirements only to retail sales of tangible personal property.

Alabama Rule 810-6-2-.90.04 limits the marketplace facilitator option to collect or comply with notice requirements to retail sales of tangible personal property exceeding the annual \$250,000 sales volume threshold.

California, at 2019 AB 147, limits the sales volume threshold for its marketplace facilitator collection requirement only to retail sales of tangible personal property.

New York and Oklahoma define a marketplace facilitator/provider only with respect to retail sales of tangible personal property, thus appearing to limit any collection requirement to such sales.

New York 2019 S. 1509 Part G provides:

Marketplace provider. A person who, pursuant to an agreement with a marketplace seller, facilitates sales of tangible personal property by such marketplace seller or sellers.

Oklahoma 2018 HB 1019 provides:

"Marketplace facilitator" means a person that facilitates the sale at retail of tangible personal property.

South Carolina, at 2019 SB 214, limits the marketplace facilitator collection requirement only to retail sales of tangible personal property.

When the sales transaction involves other applicable taxes, besides sales/use tax, which party (marketplace facilitator/provider or marketplace seller) should be responsible to collect?

ADOR Response: Marketplace Facilitator.

At least one state (IN) has extended marketplace facilitator/provider collection requirements to include certain other excise taxes (food & beverage taxes, innkeeper taxes).

Indiana 2019 HEA 1001, p. 137 provides:

(f) A marketplace facilitator who is considered a retail merchant under section 18 of this chapter for a transaction to which this section applies shall collect and remit innkeeper's taxes imposed under IC 6-9 on the retail transaction.

Indiana 2019 HEA 1001, p. 155 provides:

Sec. 6. (a) A marketplace facilitator (as defined in HEA 1001 — CC 1 155 IC 6-2.5-1-21.9) of rooms, lodgings, or accommodations subject to taxation under this article is considered the person engaged in the business of renting or furnishing the rooms, lodgings, or accommodations and is required to collect and remit any taxes imposed under this article.

Indiana 2019 HEA 1001, p. 156 provides:

Sec. 2. (a) A marketplace facilitator (as defined in IC 6-2.5-1-21.9) subject to the requirements HEA 1001 — CC 1 156 to collect sales tax on its own transactions or on behalf of its sellers in accordance with IC 6-2.5-4-18 is also required to collect any taxes imposed under this article [food and beverage tax] on a transaction that it facilitates.

The RILA Model contains a provision that would allow the parties to negotiate which party has to collect and remit other applicable taxes:

Nothing herein shall prohibit the marketplace facilitator and the seller from contractually agreeing to have the seller collect and remit all applicable taxes and fees where the marketplace seller:

1. Has annual U.S. gross sales over \$1 billion, including the gross sales of any related entities; and,
2. Provides evidence to the marketplace facilitator that it is registered under [cite code section] in this state and also registered to collect sales and use tax in every state where the product or service can be sold.

6. Marketplace seller economic nexus threshold calculation

Should the marketplace seller, in determining whether it has exceeded the state's economic nexus threshold and is obligated to register and collect sales/use tax on its direct remote sales, be able to exclude its facilitated sales (for which the marketplace facilitator/provider is responsible for collecting tax on) and only count its direct remote sales?

ADOR Response: Yes. Allow the marketplace seller to exclude facilitated sales from the threshold calculation.

Most states that have enacted marketplace facilitator/provider collection requirements include in the marketplace seller's economic nexus threshold facilitated sales, even though the marketplace facilitator/provider is required to collect on those sales. However, the following states allow the marketplace seller to exclude facilitated sales from its economic nexus threshold determination when the marketplace facilitator/provider is collecting on those sales: AR CO IL IN MA UT VA. This

avoids requiring marketplace sellers to register and file returns, when those sellers only have a small volume of direct remote sales into a state and minimal tax liability, but would otherwise exceed the economic nexus threshold, if both direct sales and facilitated sales are counted in the threshold. Examples are shown below.

Arkansas 2019 SB 576 provides:

26-52-111. Remote sellers and marketplace facilitators.

(a) A remote seller or a marketplace facilitator that sells or facilitates the sale of tangible personal property, taxable services, a digital code, or specified digital products for delivery into Arkansas shall collect and remit the applicable sales tax levied under this chapter or the applicable compensating use tax levied under the Arkansas Compensating Tax Act of 1949, § 26-53-101 et seq., if in the previous calendar year or in the current calendar year, the remote seller or the marketplace facilitator had aggregate sales of tangible personal property, taxable services, digital codes, or specified digital products subject to Arkansas sales or use tax within this state or delivered to locations within this state exceeding:

(1) One hundred thousand dollars (\$100,000); or (2) Two hundred (200) transactions.

(b) A sale made through a marketplace facilitator:

(1) Is a sale of the marketplace facilitator for purposes of determining whether a person satisfies the criteria stated in subsection (a) of this section; and

(2) Is not a sale of the marketplace seller for purposes of determining whether a person satisfies the criteria stated in subsection (a) of this section.

Colorado HB 19-1240 provides:

(II) BEGINNING OCTOBER 1, 2019, FOR PURPOSES OF DETERMINING WHETHER THE THRESHOLDS SET FORTH IN SUBSECTION (3)(c)(I) OF THIS SECTION ARE MET:

(A) A MARKETPLACE FACILITATOR SHALL INCLUDE ALL SALES MADE BY MARKETPLACE SELLERS IN AND THROUGH ITS MARKETPLACE; AND

(B) A MARKETPLACE SELLER SHALL NOT INCLUDE ANY SALES MADE IN OR THROUGH A MARKETPLACE FACILITATOR'S MARKETPLACE.

Illinois 2019 SB 689 provides:

Beginning January 1, 2020, neither the gross receipts from nor the number of separate transactions for sales of tangible personal property to purchasers in Illinois that a retailer makes through a marketplace facilitator and for

which the retailer has received a certification from the marketplace facilitator pursuant to Section 2d of this Act shall be included for purposes of determining whether he or she has met the thresholds of this paragraph (9).

Beginning January 1, 2020, neither the gross receipts from nor the number of separate transactions for sales of service to purchasers in Illinois that a serviceman makes through a marketplace facilitator and for which the serviceman has received a certification from the marketplace facilitator pursuant to Section 2d of this Act shall be included for purposes of determining whether he or she has met the thresholds of this paragraph (9).

Indiana 2019 HEA 1001, p. 143 provides:

(d) A marketplace facilitator must include both transactions made on its own behalf and transactions facilitated for sellers under IC6-2.5-4-18 for purposes of establishing the requirement to collect gross retail or use tax without having a physical presence in Indiana for purposes of subsection (c). In addition, except in instances where the marketplace facilitator has not met the thresholds in subsection (c), the transactions of the seller made through the marketplace are not counted toward the seller for purposes of determining whether the seller has met the thresholds in subsection (c).

Massachusetts 2019 H 4000 provides:

(d) If a marketplace facilitator reports, collects and remits tax on sales made by the marketplace facilitator on behalf of a remote marketplace seller, such sales shall not be counted as a part of the remote marketplace seller's sales within the commonwealth and the remote marketplace seller shall not be liable to report those sales.

Utah 2019 SB 168 provides:

(8) A marketplace seller shall pay or collect and remit sales and use taxes imposed by this chapter for a sale of tangible personal property, a product transferred electronically, or a service that the marketplace seller makes other than through a marketplace facilitator if:

- (a) the sale is sourced to this state; and
- (b) the marketplace seller's sales in this state, other than through a marketplace facilitator, in the previous calendar year or the current calendar year:
 - (i) exceed \$100,000; or
 - (ii) occur in 200 or more separate transactions.

Virginia 2019 H 1722 provides:

H. When a marketplace seller that is not otherwise required to register for the collection of the tax under any of the provisions contained in subdivisions C 1 through 9 of § 58.1-612 makes both direct sales and sales on a marketplace facilitator's marketplace, only the marketplace seller's direct sales shall be considered in determining whether the marketplace seller is required to register for the collection of the tax under subdivision C 10 or 11 of § 58.1-612. I.

7. Remote Seller sales/use tax economic nexus threshold issues

Should the remote sellers' sales volume economic nexus threshold be limited only to retail sales, or even further limited to taxable sales?

ADOR Response: Retail sales. Alabama Rule 810-6-2-.90.04 calculates the qualifying amount (\$250,000) based on transactions which is defined as "Transaction: A sale or purchase at retail of tangible personal property made through the marketplace facilitator's marketplace by or on behalf of a marketplace seller for delivery to a location in this state, whether by the marketplace facilitator or another person."

Many states that have enacted economic nexus thresholds for sales/use tax base those on gross sales, which leaves the question: does the threshold include wholesale sales? Some states expressly provide that only retail sales are included in their economic nexus thresholds: AL AZ CO GA MN NE NM NV VA WA. Those would appear to exclude wholesale sales. Only two states limit their sales/use tax economic nexus thresholds to taxable sales: ND OK.

Should the "transactions" economic nexus threshold be eliminated?

ADOR Response: Yes. Alabama does not have a transaction threshold in the calculation of economic nexus, but has a \$250,000 sales threshold.

Most states that have enacted sales/use tax economic nexus provide that if either the sales volume threshold or the transactions volume threshold is exceeded, then nexus exists, and the remote seller is required to register and commence collecting and remitting sales/use tax. The following states do not include a transactions threshold in their sales/use tax economic nexus statutes: SC ND WA CO ID IA NM PA MA OK CA TX AZ. Of those, CA and TX use a \$500,000 threshold. New York has a \$500,000 threshold and 100 transactions threshold. Arizona has a \$200,000 sales

volume threshold for remote sellers that decreases by \$50,000 per year until it reaches \$100,000 in 2021, but marketplace facilitators are subject to the \$100,000 sales volume threshold as of 2019. Connecticut uses a \$100,000 sales volume and 200 transactions threshold. By regulation, TN uses a \$500,000 sales volume threshold, and AL and MS use a \$250,000 sales volume threshold.

See National Association of Certified Service Providers (NACSP) suggestions under “Thresholds for Collection Obligation for Small Retailers:”

Thresholds for Collection Obligation for Small Retailers

All States

- Provide clear guidance to retailers on when their obligation begins.
- Adopt uniform policies and definitions for application of thresholds.
 - Include or exclude exempt sales?
 - When does the collection obligation begin if the threshold is met during a year?
 - Use calendar year or fiscal year or trailing 12 months?

8. Certification requirement

Should states develop a certification process for marketplace facilitator/providers, to establish that they can correctly handle the sales/use tax collection and remittance responsibilities on their facilitated sales?

ADOR Response: No.

To date, it does not appear that any state has adopted such certification requirements for marketplace facilitators. States that are members of the Streamlined Sales and Use Tax Agreement (SSUTA) have adopted certification requirements for certified service providers. However, a marketplace facilitator would not need to go through that certification process unless it wanted to become a certified service provider under the SSUTA.

How does the marketplace seller know if the marketplace facilitator/provider has collected? Should the marketplace facilitator/provider be required to provide a certification or report to the marketplace seller?

ADOR Response: Currently under Alabama law § 40-23-199.2, the marketplace facilitator is only required to provide the purchaser, not the

marketplace seller, with a statement or invoice showing that tax was collected and shall be remitted on the purchaser's behalf.

Several states require the marketplace facilitator/provider to certify to the marketplace seller that it is collecting on facilitated sales: CO CT IL ME ND ND NY RI TX VT WI. The marketplace seller can then rely on that certificate to verify to the taxing authority that the marketplace facilitator/provider, not the marketplace seller, is responsible for collect sales/use tax on the facilitated transactions. It would serve a function similar to an exemption certificate.

Examples of state requirements for the marketplace facilitator/provider to issue a certificate to marketplace seller are provided below:

Colorado HB 19-1240:

(c) EXCEPT AS PROVIDED IN SUBSECTION (3)(b) OF THIS SECTION, A MARKETPLACE SELLER, WITH RESPECT TO SALES OF TANGIBLE PERSONAL PROPERTY, COMMODITIES, OR SERVICES MADE IN OR THROUGH A MARKETPLACE FACILITATOR'S MARKETPLACE, DOES NOT HAVE THE LIABILITIES, OBLIGATIONS, OR RIGHTS OF A RETAILER OR VENDOR UNDER SUBSECTION (1) OF THIS SECTION AND THIS ARTICLE 26 IF THE MARKETPLACE SELLER CAN SHOW THAT SUCH SALE WAS FACILITATED BY A MARKETPLACE FACILITATOR:

(I) WITH WHOM THE MARKETPLACE SELLER HAS A CONTRACT THAT EXPLICITLY PROVIDES THAT THE MARKETPLACE FACILITATOR WILL COLLECT AND REMIT SALES TAX ON ALL SALES SUBJECT TO TAX UNDER THIS ARTICLE 26; OR

(II) FROM WHOM THE MARKETPLACE SELLER REQUESTED AND RECEIVED IN GOOD FAITH A CERTIFICATION THAT THE MARKETPLACE FACILITATOR IS REGISTERED TO COLLECT SALES TAX AND WILL COLLECT SALES TAX ON ALL SALES SUBJECT TO TAX UNDER THIS ARTICLE 26 MADE IN OR THROUGH THE MARKETPLACE FACILITATOR'S MARKETPLACE.

Illinois 2019 SB 689:

(d) A marketplace facilitator shall:

(1) certify to each marketplace seller that the marketplace facilitator assumes the rights and duties of a

retailer under this Act with respect to sales made by the marketplace seller through the marketplace; and
(2) collect taxes imposed by this Act as required by Section 3-45 of this Act for sales made through the marketplace.

New York 2019 H 4000:

(3) The commissioner may, in his or her discretion: (A) develop a standard provision, or approve a provision developed by a marketplace provider, in which the marketplace provider obligates itself to collect the tax on behalf of all the marketplace sellers for whom the marketplace provider facilitates sales of tangible personal property, with respect to all sales that it facilitates for such sellers where delivery occurs in the state; and (B) provide by regulation or otherwise that the inclusion of such provision in the publicly-available agreement between the marketplace provider and marketplace seller will have the same effect as a marketplace seller's acceptance of a certificate of collection from such marketplace provider under paragraph two of this subdivision.

North Dakota 2019 SB 2338:

d. Certify to its marketplace sellers that it will collect and remit state and local sales and use tax on sales of tangible personal property or other products or services subject to tax under section 57 - 39.2 - 02.1 made through the marketplace. A marketplace seller that accepts a marketplace facilitator's collection certificate in good faith may exclude sales made through the marketplace from the marketplace seller's return of gross receipts under section 57 - 39.2 - 11 .

Rhode Island 2019 S 251:

(ii) A marketplace facilitator shall certify to its marketplace sellers that it will collect and remit sales and use tax on sales of taxable items made through the marketplace. A marketplace seller that accepts a marketplace provider's collection certificate in good faith may exclude sales made through the marketplace from the marketplace seller's returns under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws.

Texas:

(c) A marketplace provider shall:

(1) certify to each marketplace seller that the marketplace provider assumes the rights and duties of a seller or retailer under this chapter with respect to sales made by the marketplace seller through the marketplace;

Vermont 2019 H 536:

(b) A marketplace facilitator shall certify to its marketplace sellers that it will collect and remit the sales tax under this chapter on the sale of taxable items made through its marketplace. A marketplace seller that accepts a certification from a marketplace facilitator in good faith shall exclude sales made through the marketplace from its obligation as a vendor under this chapter.

Wisconsin 2019 AB 251:

(2) A marketplace provider who collects and remits tax on a sale under sub. (1) shall notify the marketplace seller that the marketplace provider is collecting and remitting the tax. Only the marketplace provider may be audited and held liable for the tax on the sale. Except for transactions for which a marketplace provider seeks relief under sub. (4), a marketplace seller shall not be subject to audit or held liable on marketplace provider transactions.

See NACSP suggestions under “Providing Software to Remote Sellers:”

Providing Software to Remote Retailers

Non SST States

- Consider addressing most of the issues above by certifying comprehensive software solutions and making them available to remote sellers.